UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

I-FLOW CORPORATION, a Delaware corporation, Plaintiff, vs. ZONE MEDICAL, L.L.C., a California limited liability company,, Defendant.	CASE NO. 08cv0057 DMS (NLS) **ORDER (1) DENYING DEFENDANT'S MOTION TO DISMISS, (2) DENYING DEFENDANT'S MOTION TO STAY AND (3) GRANTING PLAINTIFF'S MOTION TO CONSOLIDATE** **[Docket Nos. 7, 11]**

This matter comes before the Court on Defendant Zone Medical's motion to dismiss, or in the alternative, motion to stay, and Plaintiff I-Flow's motion to consolidate. The parties have filed opposition and reply briefs to the respective motions. For the reasons discussed below, the Court denies Defendant's motion, and grants Plaintiff's motion.

I.

BACKGROUND

This case arises out of Defendant's marketing of the SOLACE Post-Operative Pain Relief Infusion System, which includes the SOLACE Infusion Pump. Plaintiff alleges Defendant's manufacture and sale of the SOLACE Infusion System and Pump infringes United States Patent Number 5,284,481 ("the '481 Patent"), which Plaintiff owns by assignment.

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On January 10, 2008, Plaintiff filed the original complaint in this case, alleging a claim for infringement of the '481 Patent by Defendant. Plaintiff has also alleged a claim for infringement of the '481 Patent against two other defendants, Apex Medical Technologies, Inc. and Mark McGlothlin, in Case Number 07cv1200 DMS (NLS), which is currently pending before this Court. Apex and McGlothlin are alleged to be the manufacturers of the SOLACE Pump.

II.

DISCUSSION

Defendant moves to dismiss the Complaint against it on the ground of claim splitting. In the alternative, Defendant moves to stay this case pending reexamination of the '481 Patent. Plaintiff opposes both requests, and moves to consolidate this case with the *Apex* case.

A. Motion to Dismiss

Dismissal pursuant to Rule 12(b)(6) is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001) (citing *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)). In deciding a 12(b)(6) motion, all material factual allegations of the complaint are accepted as true, as well as all reasonable inferences to be drawn from them. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996). However, the court need not accept all conclusory allegations as true; rather, it must "examine whether conclusory allegations follow from the description of facts as alleged by the plaintiff." *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992) (citation omitted). *See also Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 275-76 (9th Cir. 1982) (court need not accept conclusory legal assertions); *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir. 1977) ("Conclusory allegations, unsupported by facts, [will be] rejected as insufficient to state a claim under the Civil Rights Act."); *accord Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984) ("All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true."). A claim "'should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Perfect 10, Inc. v. Visa Intern. Service Ass'n*, 494 F.3d 788, 794 (9^{th} Cir. 2007) (quoting *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9^{th} Cir. 2002)), *pet. for cert. filed*, (Feb. 6, 2008) (No. 07-1026).

"The doctrine of claim splitting bars a party from subsequent litigation where the 'same controversy' exists." *Single Chip Systems Corp. v. Intermec IP Corp.*, 495 F.Supp.2d 1052, 1058 (S.D. Cal. 2007) (citing *Nakash v. Superior Court*, 196 Cal. App. 3d 59, 68 (1987)). The purpose of the doctrine is "'to protect the defendant from being harassed by repetitive actions based on the same claim.'" *Id.* To determine if the doctrine applies, "the Ninth Circuit 'borrow[s] from the test for claim preclusion.'" *Id.* (quoting *Adams v. Cal. Dep't of HealthServs.*, 487 F.3d 684, 688 (9th Cir.), *cert. denied*, ___ U.S. ___, 128 S.Ct. 807 (2007)). That test asks "whether the causes of action and relief sought, as well as the parties or privies to the action, are the same." *Adams*, 487 F.3d at 689.

Here, Defendant argues all the elements of claim preclusion are met. It states the claim in this case is the same as the claim presented in the *Apex* case, and it is in privity with Apex. Plaintiff does not dispute that both cases involve a claim for infringement of the '481 Patent, but it does dispute the issue of privity.

"Privity 'is a legal conclusion designating a person so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved.'" *Kourtis v. Cameron*, 419 F.3d 989, 996 (9th Cir. 2005) (quoting *United States v. Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997)). Here, Defendant asserts its interests are identical to those of Apex because both cases involve the SOLACE pump and the '481 Patent. That the product and patent are the same, however, does not lead to the legal conclusion that the interests of Defendant and Apex are identical. For instance, as the alleged marketer of the SOLACE pump, Defendant's case may focus on the "selling, importing and/or offering to sell" prong of the patent infringement statute. By contrast, Apex, as the alleged manufacturer, may focus its case on the "making"prong. At this stage, however, there is no evidence presently before the Court that would allow for a legal finding that these parties are in privity. Accordingly, Defendant's claim splitting argument does not warrant dismissal of this case.

B. Motion to Stay

In the absence of dismissal, Defendant moves for a stay of this case pending reexamination of the '481 Patent. Defendants McGlothlin and Apex presented the same request in their case against

I-Flow, and the Court denied that request in an Order dated April 15, 2008. For the reasons stated therein, Defendant's motion to stay this case is also denied.

C. Motion to Consolidate

In light of the rulings above, Plaintiff moves to consolidate this case with the *Apex* case pursuant to Federal Rule of Civil Procedure 42(a). Defendant's opposition relies on the same arguments presented in its motion to dismiss, which the Court rejects for the reasons set out above. There being no other argument in response, the Court finds the requirements of Rule 42(a) are met. Accordingly, Plaintiff's motion to consolidate is granted. The Clerk of the Court shall maintain a Master Docket and Master File in Case Number 07cv1200 DMS (NLS). All orders pleadings, motions and other documents shall be filed in the Master File.

III.

CONCLUSION AND ORDER

In light of the above, the Court denies Defendant's motion to dismiss, denies Defendant's alternative motion to stay, and grants Plaintiff's motion to consolidate.

IT IS SO ORDERED.

DATED: May 15, 2008

HON. DANA M. SABRAW
United States District Judge